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International Law: No Remedies for Violation of the Foreign Nationals' Right to Consular Notification: United States v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002)

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NO REMEDIES FOR VIOLATION OF THE FOREIGN NATIONALS' RIGHT TO CONSULAR NOTIFICATION: *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002)

*Patrick Dervishi**

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I. FACTS

Jose Duarte-Acero, the defendant, learned that two Drug Enforcement Agency (DEA) agents were investigating defendant's drug trafficking operations in Cartagena, Colombia.¹ Defendant, a retired lieutenant of the Colombian police, together with three other Colombian nationals, gained access to the agents' hotel room and kidnapped them.² While driving out of the city, an altercation ensued during which the defendant shot one of the agents as the agent was about to escape.³ Believing the agent was dead,

* This Case Comment was chosen as the best Comment for the Fall 2002 competition. Many thanks to FJIL board members who acknowledged that this Comment had something to say, especially Matt for his suggestions. The deepest gratitude goes to my wife Celia who continues to be by my side.

1. *United States v. Duarte-Acero*, 296 F.3d 1277, 1278 (11th Cir. 2002).

2. Three other Colombian nationals, Rene Benitez, Armando Benitez, and Jairo David Valencia, were involved in the event that took place on February 10, 1982. They were co-defendants in the lower court proceedings. *United States v. Benitez*, 28 F. Supp. 2d 1361, 1362 (S.D. Fla. 1998).

3. *Id.* Defendant, together with the other three Colombian nationals, kidnapped DEA agents Martinez and McCullogh at gunpoint and directed them to enter the car which defendant drove out of the city of Cartagena, Colombia. Rene Benitez held his gun on Martinez and shot him in the hip. An altercation ensued and McCullogh managed to run away but fell into a ditch. At this time,

the defendant left him unconscious on the ground. Eventually, both DEA agents made their way to the United States alive.⁴

The United States charged defendant with, *inter alia*, conspiracy to commit murder⁵ and the DEA set in motion plans to bring defendant to justice in the United States. After receiving information that defendant was in Venezuela, the DEA helped Venezuelan authorities arrest him. However, because of defendant's nationality, Venezuela released defendant into the custody of the Colombian authorities.⁶ Colombia tried defendant for the kidnap and the attempted murder and convicted him on those charges.⁷

After release from prison, the DEA intensified its efforts to bring defendant to the United States and punish him. This time, the DEA managed to set up a sting operation in Ecuador and apprehended defendant while he crossed the Colombia-Ecuador border. Defendant repeatedly requested that he wished to speak with the Colombian Consulate in Ecuador but Ecuador denied his request. Subsequently, the DEA brought defendant to the United States.⁸

Following arrival in the United States, the United States started judicial proceedings in the Southern District of Florida. Defendant pleaded not guilty and moved twice to dismiss the indictment. The first motion was based on grounds of the double jeopardy provision of the International Covenant on Civil and Political Rights (ICCPR) and the international principle of *non bis in idem*.⁹ The district court denied defendant's motion,

defendant fired a shot in McCulloch's neck. McCulloch waited for another shot but that shot never came. On the other side, Martinez managed to get up from the rear seat of the car and ran away from Rene Benitez. Both agents survived and were finally airlifted to a U.S. military hospital in Panama. See *United States v. Benitez*, 741 F.2d 1312, 1313-15 (11th Cir. 1984) (detailing the facts).

4. *Benitez*, 741 F.2d at 1315.

5. The indictment includes five counts. Count I charges defendant with conspiracy to kill the agents in violation of 18 U.S.C. § 1117. Count II and III charge defendant with using dangerous weapons to assault, resist, and impede the agents in the performance of their duties in violation of 18 U.S.C. § 1117. Count IV and V charge defendant with robbing the agents of their DEA credentials and their passports in violation of 18 U.S.C. § 2112. *Duarte-Acero*, 296 F.3d at 1280.

6. *Id.* at 1279.

7. *Id.* (the United States attempted to extradite defendant pursuant to its extradition treaty with Colombia. On May 30, 1983, Colombia's highest court denied the request of the United States. In 1987, the same court annulled the extradition treaty because its ratification was unconstitutional.).

8. *Id.* at 1279-80.

9. *Id.* at 1280 n.4 ("Not twice for the same thing." quoting BLACK'S LAW DICTIONARY 1665 (7th ed. 1999)).

and the Eleventh Circuit affirmed on interlocutory appeal.¹⁰ The second motion was based on grounds of defendant's denial of his right to notify consul under the Vienna Convention on Consular Relations (VCCR). Again, the district court denied the motion. The district court found defendant guilty on all counts and sentenced him to life in prison.¹¹ Defendant appealed the conviction and raised as an issue of error the district court's failure to dismiss the indictment because defendant's rights guaranteed by VCCR were violated. The Eleventh Circuit affirmed, and held that defendant sought a remedy, i.e., the dismissal of the indictment, not available to him under the VCCR.¹²

II. HISTORY

Treaties are part of U.S. law¹³ and are the supreme law of the land.¹⁴ The United States signed and ratified the VCCR¹⁵ without the Senate attaching any reservations.¹⁶ The law is settled that VCCR is a self-executing treaty and foreign nationals may bring their case in U.S. courts.¹⁷ So far, all cases have been brought under Article 36 of the VCCR which

10. *United States v. Duarte-Acero*, 208 F.3d 1282, 1286 (11th Cir. 2000) (holding that ICCPR bars successive prosecution for the same "offense only when the accused is tried under the same law and criminal procedure"; thus, ICCPR would not bar prosecution for the same offense when the second prosecution takes place in a different country).

11. Defendant was sentenced to life in prison for Count I, 10 years each on Counts II and III, and 15 years each on Counts IV and V. *Duarte-Acero*, 296 F.3d at 1280.

12. *Id.* at 1282.

13. *The Paquete Habana*, 175 U.S. 677, 700. (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of rights depending upon it are duly presented for their determination.")

14. The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

15. See Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified Nov. 24, 1969) [hereinafter VCCR].

16. *Id.*; see also Linda Jane Springrose, *Strangers in a Strange Land: the Rights of Non-Citizens under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L.J. 185, 187 (1999).

17. *Beard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998); see also Springrose, *supra* note 16, at 187.

provides that law enforcement authorities should promptly inform the consular post of the foreign national detained or in custody if the foreign national so requests.¹⁸ Against this framework, the VCCR operates equally toward the federal government and the states which not only must refrain from violating treaty rights but also are under an affirmative duty of good faith to perform treaty obligations.¹⁹

In *Breard v. Greene*,²⁰ the U.S. Supreme Court recognized that the VCCR arguably confers an individual right to consular assistance after arrest.²¹ In that case, the Commonwealth of Virginia convicted Angel Breard, a Paraguayan national, of attempted rape and capital murder and sentenced him to death.²² After the Virginia Supreme Court affirmed the conviction and the sentence, Breard filed a motion for habeas relief in federal court.²³ Since the Virginia authorities had failed to inform Breard

18. VCCR, *supra* note 15, art. 36. Article 36 provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending state; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention . . . in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Id.

19. *Missouri v. Holland*, 252 U.S. 416, 434 (1920).
20. 523 U.S. 371 (1998).
21. *Id.* at 376.
22. *Id.* at 372.
23. *Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994).

of the right to contact the Paraguayan Consulate, Breard, for the first time in his motion for habeas relief, argued that his VCCR rights had been violated.²⁴

Although the U.S. Supreme Court recognized that the VCCR is the supreme law of the land,²⁵ it held that the rights the VCCR creates “shall be exercised in conformity with the laws and regulations of the receiving State.”²⁶ In criminal proceedings, the petitioner, raising assertions of error, must raise them during trial;²⁷ otherwise, claims not raised are considered defaulted. As such, Breard was procedurally barred from raising his VCCR claim because he did not raise the issue during trial.²⁸ Also, the U.S. Supreme Court denied Breard’s request for an evidentiary hearing to show prejudice because of the VCCR violation. The Court stated that the Antiterrorism and Effective Death Penalty Act²⁹ precluded the application of the VCCR as a subsequent enacted domestic law conflicting with treaty obligations.³⁰

Notwithstanding the predisposition to resolve the conflict in favor of the domestic law,³¹ the U.S. Supreme Court stated that “*without some showing that the [VCCR] violation had an effect on the trial*” — had Breard’s claims been properly raised — the conviction should not be overturned.³² The U.S. Supreme Court had no doubt that Breard suffered no prejudice since he was offered effective counsel.³³ The U.S. Supreme Court disposed the case procedurally without determining what rights or remedy the courts should afford to a foreign national in case of prejudice.³⁴

24. *Breard*, 523 U.S. at 373.

25. *See id.* at 375.

26. VCCR, *supra* note 15, art. 36, ¶ 2.

27. *Breard*, 523 U.S. at 375 (“It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas.”).

28. *Id.* at 375-76.

29. *Id.* at 376 (explaining that the Antiterrorism and Effective Death Penalty Act provides that a habeas petitioner claiming violation of a treaty will not be granted an evidentiary hearing to show prejudice if the petitioner has failed to articulate the factual basis during trial proceedings).

30. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) (“We have held “that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”)).

31. Curtis Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 565 (1999).

32. *Breard*, 523 U.S. at 377 (emphasis added).

33. *Id.*

34. *See id.*; *see also* Bradley, *supra* note 31, at 565 (stating that it was easy for the U.S. Supreme Court to deny relief to Breard as a matter of domestic law).

Following the narrow *Breard's* holding in *United States v. Lombera-Camorlinga*, the Ninth Circuit refused to answer whether the VCCR creates individual rights.³⁵ Instead, the Ninth Circuit decided the case from the remedy standpoint; more specifically, it answered whether the exclusionary rule was an appropriate remedy for a VCCR violation.³⁶

In *Lombera-Camorlinga*, the defendant, a Mexican national, was arrested crossing the Mexico-U.S. border carrying marijuana.³⁷ The law enforcement authorities advised the defendant of his Miranda rights but did not inform him of the VCCR right to contact counsel. Subsequently, the defendant made self-incriminating statements.³⁸ The defendant moved to suppress the statements because they were obtained in violation of Article 36 of the VCCR, but the lower court denied his motion.³⁹

On defendant's second appeal, the Ninth Circuit held that whatever common law remedies may exist, i.e., damages or equitable relief, the exclusionary rule is an American rule that applies only to constitutional rights, not treaty rights.⁴⁰ Under international comity principles, the Ninth Circuit deferred to the State Department's interpretation that suppression of the evidence is not an appropriate remedy under Article 36 of the VCCR.⁴¹

On the first look, the Eleventh Circuit seemed to follow the majority of the circuits in deciding *United States v. Cordoba-Mosquera*.⁴² The Eleventh Circuit assumed that the VCCR creates individual rights but disposed the VCCR issue on grounds of the absence of prejudice.⁴³ In that case, law enforcement authorities arrested the defendants, one Colombian

35. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884 (9th Cir. 2000) ("We do not decide whether the treaty creates individual rights that are judicially enforceable in other ways.").

36. *Id.* at 883.

37. *Id.* at 884.

38. *Id.*

39. *Id.* On defendant's first appeal to the 9th Circuit, that panel held that the district court erred in denying defendant's motion to suppress without making a determination of prejudice. The 9th Circuit held that VCCR creates judicially enforceable individual rights and that the suppression of the evidence may serve as a remedy for violating the rights of foreign nationals under VCCR if the foreign national can demonstrate prejudice. *United States v. Lombera-Camorlinga*, 170 F.3d 1241, 1244 (9th Cir. 1999). The Ninth Circuit then agreed to rehear the case en banc. *Lombera-Camorlinga*, 206 F.3d at 884 ("A majority of the active, nonrecused judges of this court voted to rehear the case en banc.").

40. *Lombera-Camorlinga*, 206 F.3d at 883-84.

41. *Id.* at 887.

42. 212 F.3d 1194 (11th Cir. 2000).

43. *Id.* at 1196 ("Even if the remedies requested by defendants may be available in some cases involving Article 36 violations, those remedies are not available absent a showing of prejudice.").

national and two Ecuadorian nationals, on board of an oceangoing freighter because they found loads of cocaine.⁴⁴ The government tried and convicted the defendants on all charges.⁴⁵ On appeal, defendants sought to exclude evidence and set aside the conviction since the government did not comply with VCCR obligations and failed to inform the defendants of their rights.⁴⁶

Again, the circuit court focused more on the issue of remedy than on the violation of the VCCR. Although it rejected defendants' argument that the remedies they sought were not available under Article 36, the circuit court left open a window of opportunity.⁴⁷ The remedy, i.e., exclusion of evidence, dismissal of the indictment, and setting aside of the conviction, could be available if the foreign national could show that the VCCR violation had caused prejudice.⁴⁸ Nonetheless, that opportunity was foreclosed when the Eleventh Circuit decided the instant case.

III. INSTANT CASE

In the instant case, the Eleventh Circuit held that the dismissal of the indictment is not available under VCCR.⁴⁹ Rather, the remedies available to a foreign national are diplomatic, political, or those proscribed in international law.⁵⁰ The circuit court acknowledged that defendant's right to counsel was violated because the Colombian consul had not been notified of the defendant's arrest.⁵¹ Although the Eleventh Circuit did not reject explicitly defendant's argument that the government's violation had caused prejudice, it saw the issue as peripheral and decided the case on grounds of the remedies requested.⁵²

The decision in *Cordoba-Mosquera* may have cast some doubt as to what effect a showing of prejudice could make on the resolution of the

44. *Id.* at 1195. On August 5, 1996, upon the arrival of the freighter *St. Kitts* in Miami after departing from Colombia, the U.S. Customs Service and Coast Guard discovered over forty bales of cocaine in one of the *St. Kitts*' shipping containers. *Id.* Before departing from Colombia, the ship's containers had been searched by police, but no cocaine had been found. *Id.* Based upon this, U.S. authorities determined that the cocaine had been transferred to the *St. Kitts* from another ship on the high seas, and consequently arrested defendants. *Id.*

45. *Id.*

46. *Id.* at 1195-96.

47. *Cordoba-Mosquera*, 212 F.3d at 1196.

48. *Id.*

49. *United States v. Duarte-Acero*, 296 F.3d 1277, 1281 (11th Cir. 2002).

50. *Id.* at 1282.

51. *Id.* at 1281.

52. *Id.* at 1281-82.

issue, but to this court, there was no doubt that defendant sought a remedy which had no textual support.⁵³ The circuit court's textual analysis viewed the VCCR as a means to an end rather than a source of individual rights. The Preamble's stated purpose is to facilitate the performance of consular heads on the receiving States.⁵⁴ Moreover, the Preamble shows that the VCCR did not create individual rights.⁵⁵ The circuit court avoided the language of the Article 36 of the VCCR and focused instead on the majority of the opinions by other circuits.⁵⁶

Furthermore, the circuit court dealt with two additional factors on the remedy issue. First, the circuit court deferred to the State Department's interpretation of the treaty as authority on matters of foreign relations. The State Department excludes the dismissal of the indictment as an available remedy under Article 36.⁵⁷ Second, the circuit court found that no other nation had dismissed criminal charges because defendant's VCCR rights were violated.⁵⁸ Earlier, Italy and Australia had decided the issue and rejected the possibility of the existence of such remedy.⁵⁹ Under international comity and congruent application by all parties to the VCCR, the circuit court rejected the remedy sought.⁶⁰

IV. ANALYSIS

The circuit court's decision in the instant case is not a surprise. Other circuits had or would have decided the issue the same way. However, the Eleventh Circuit went beyond precedents.

In interpreting treaties, the circuit court must first look at the language of the treaty itself.⁶¹ In the instant case, the circuit court focuses solely on the Preamble of the VCCR and its stated purpose,⁶² and ignores the

53. *Id.*

54. VCCR, *supra* note 15, pmb1.

55. *Duarte-Acero*, 296 F.3d at 1281-82.

56. *See id.* at 1282.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Duarte-Acero*, 296 F.3d at 1282.

61. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992).

62. *Duarte-Acero*, 296 F.3d at 1281-82 ("First, the Vienna Convention itself disclaims any intent to create individual rights, stating that its purpose "is not to benefit individuals but to ensure the efficient performance of functions by consular posts.").

language of Article 36. Concededly, Article 36 is framed in general terms and has proven difficult when interpreted as creating individual rights.⁶³ Nevertheless, the U.S. Supreme Court has spoken, although in dictum, that the VCCR "arguably confers" individual rights.⁶⁴

Generally, courts have disposed the issue of individual rights as irrelevant and have focused more on the prejudice factor.⁶⁵ However, due to lack of knowledge of VCCR obligations, defendants never raise such issues during trial. As such, courts have easily decided the cases on procedural grounds.⁶⁶ The shift in awareness, due to *Breard's* aftermath, has created ramifications for lower courts that have consistently refused to decide the issue explicitly one way or the other.⁶⁷

In the instant case, the Eleventh Circuit becomes the vanguard of a trend that explicitly indicates that the VCCR does not create an individual right to consular notification; rather, the right belongs to the consular head.⁶⁸ As such, it follows that foreign nationals cannot enforce their rights in U.S. courts. Notwithstanding the individual rights issue, the court also denies foreign nationals those remedies that are appropriate to criminal defendants in the United States.⁶⁹

The question whether Article 36 creates individual rights is so intertwined with the issue of remedies, that courts cannot resolve one without the other. More specifically, a right cannot exist without an appropriate remedy.⁷⁰ What, then, is an appropriate remedy for VCCR violations?

63. Springrose, *supra* note 16, at 189-90 (offering an analysis of the negotiating history of the treaty and the debate during preparatory committee meetings leading to the adoption of Article 36).

64. *Breard v. Greene*, 523 U.S. 371, 376 (1998); *see also* *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) ("On a general level, the Supreme Court has recognized that treaties can in some circumstances create individually enforceable rights.").

65. *Duarte-Acero*, 296 F.3d at 1281; *see also* *Lombera-Camorlinga*, 206 F.3d at 885; *see generally* *United States v. Li*, 206 F.3d 56, 62 (1st Cir. 2000); *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621-22 (7th Cir. 2000).

66. Jehanne E. Henry, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 TEX. INT'L L.J. 459, 476-77 (2000); *see also* Bradley, *supra* note 31, at 565.

67. *Lombera-Camorlinga*, 206 F.3d at 889 (Boochever, J., dissenting).

68. In the instant case, the 11th Circuit categorically states that VCCR does not create individual rights. The 11th Circuit gives the Preamble to the VCCR as the only support for its assertion and swiftly moves on to the issue of appropriate remedies by citing cases from other circuits. *Duarte-Acero*, 296 F.3d at 1281-82.

69. *Id.*

70. *See generally* David Schuman, *The Right to Remedy*, 65 TEMP. L. REV. 1197 (1992).

While a criminal defendant can use the exclusionary rule if the defendant's Miranda rights are violated, the same defendant, when a foreign national, cannot use the same remedy when his VCCR rights are violated.⁷¹ This analysis has been supported by the idea that the exclusionary rule is a remedy tied to constitutional rights.⁷² However, Article 36(2) is clear. The VCCR grants an individual rights that shall be exercised in conformity with the domestic law of the receiving state which shall enable full effect to the purpose for which the rights were granted.⁷³ Because a foreign national will most likely not speak English, the exclusionary rule will serve the same purpose of the Miranda rights. First, notification of the consular right and the subsequent presence of counsel will afford a cultural bridge between the foreign national and the law enforcement authorities.⁷⁴ Thus, consular assistance will assure justice for both parties and facilitate judicial administration. Second, the application of the exclusionary rule in a VCCR context will operate as a safeguard to future violations and will deter law enforcement authorities from continuing to disregard U.S. obligations under treaty laws.⁷⁵ As such, foreign nationals should be afforded the benefit of the exclusionary rule when their VCCR rights are violated.

Although rejected by the courts, dismissal of the indictment or setting aside of the conviction is another appropriate remedy under the VCCR.⁷⁶ The deterrent principle which lays the foundation for the exclusionary rule is no less applicable here. Since most of the VCCR violations concern foreign criminal defendants or arise in criminal proceedings, due process of the foreign criminals requires the dismissal of the charges or setting aside of the conviction.⁷⁷

V. CONCLUSION

Although courts may recognize that the VCCR creates rights to foreign nationals of consular notification, no remedy has actually been acknowledged in cases where there has been a clear violation. In most

71. *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000).

72. *Lombera-Camorlinga*, 206 F.3d at 886-87.

73. VCCR, *supra* note 15, art. 36, ¶ 2.

74. *See Lombera-Camorlinga*, 206 F.3d at 894 (dissenting opinion).

75. *See id.*

76. *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002).

77. *Lombera-Camorlinga*, 206 F.3d at 889 (dissenting opinion) ("But when the foreign national can show that he or she has been prejudiced by the failure to advise him or her of such right, that prejudice should be rectified according to the protections accorded by our Constitution.").

instances, the remedy consists of a letter of apology that the State Department has sent to the state of the foreign national with a promise that the United States will observe its treaty obligations in the future. Yet, more courts are being faced with the same issue simply because that remedy fails to deter future violations. Courts and the executive branch have an obligation not only to confer rights on individuals, but also to ensure their enforcement by creating appropriate remedies.

